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In the

Supreme Court of the United States

OCTOBER TERM 1982

BETTY SANDER HARVEY,

Petitioner

vs

ROBERT E. BARD,

Respondent

BETTY SANDER HARVEY,

Petitioner

vs

ROBERT E. BARD & BATES, DEPREE, BARD AND WILSON,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT

BETTY SANDER HARVEY
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Petitioner Pro se

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QUESTIONS PRESENTED FOR REVIEW

1. Which Court has the final responsibility, not in theory, but in substance and practice to preserve and enforce Petitioner's Rights to Trial by Jury as provided for under USCA Amendment VII and the mandatory obligation to review all proceedings in which breach of such Rights is alleged?

   A. Must this Court accept the Appellate Court's bizarre upholding of the Judgment NOV entered against Petitioner by the Trial Court, and upholding of the unfounded dismissal of Petitioner's Complaint 80L 14172 by res judicata based on such Judgment NOV which actions of the Courts denied Petitioner her Constitutional Rights under USCA Amendment 7?

   B. Can the Illinois courts arbitrarily, without authority in law, dismiss Petitioner's Complaint filed for jury hearing when disputed questions of fact exist . . . and can the Courts reexamine facts determined by the jury and reverse verdict of the jury without setting forth wherein jury erred or what evidence supported the judgment NOV? Are such acts by the courts violative of USCA Amendment 7?

   C. Is Illinois Rev. Stat. (1980) Ch. 110 sec. 68.1 which provides for judgment non obstante verdicto repugnant to United States Constitution Amendment 7 without safeguards which prevent arbitrary application as in Petitioner's case?

II. Which Court has the final responsibility not in theory, but in substance and practice to preserve and enforce Ptitioner's Right to Due Process and Equal Protection of the Law provided for under USCA Amendment XIV and the mandatory obligation to review all proceedings in which breach of such Rights is alleged?

A. Can the Illinois Courts deny Petitioner her rights to due process and equal protection of the law provided for under USCA Amendment 14 by refusing to grant petition for change of venue, disqualification, or transfer, when such petitions were supported by affidavit alleging prejudice?

B. Were the judgments and orders entered against Petitioner so lacking of rational substantiation in law as to render disposal of her causes of actions violative of due process where the trial court arbitrarily usurped the province of the jury and entered a non-specific judgment NOV in the first case, which judgment was upheld in the Appellate Court so that the same justices who upheld it, could then use such judgment to uphold the trial court's wrongful dismissal of the second cause of action on the basis of res judicata of the first case . . . when in fact no final judgment exists in such case to this very day?

III. Can the Circuit Court of Illinois, evade and pass the question of the Breach of Petitioner's Civil Rights to the Appellate Court with no ruling being made . . . and the Illinois Appellate Court pass the question to the Supreme Court of the State of Illinois without addressing the issue or making ruling thereon . . . and the Supreme Court of Illinois refuse to grant Petition for Appeal . . . leaving the only avenue for review the United States Supreme Court . . . which Court grants very few petitions for Certiorari. . . .? If this Court fails to grant Certiorari, where can Petitioner turn for protection of her Constitutional Rights?

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT

Petitioner, Betty Sander Harvey, respectfully prays that the Writ of Certiorari be issued in the above entitled causes, which are closely allied, to review the opinions and judgments of the Appellate Court of Illinois, First District, affirming judgment NOV for plaintiff Bard in the matter of *Bard* v *Harvey*, and order entered by the Illinois Supreme Court denying Peti-

tioner's Petition for Leave to Appeal . . . as well as to review the order entered by the Appellate Court of Illinois, First District affirming dismissal of Petitioner's complaint in the matter of *Harvey* v *Bard, et al,* and the order entered by the Supreme Court of Illinois denying Harvey's Petition for Leave to File Appeal instanter in such case.

JUDGMENT AND OPINION BELOW

On April 20, 1982 the Appellate Court of Illinois First District entered its order* affirming judgment NOV in favor of defendant, in the matter of *Bard* v *Harvey* 77 Ml 109422. (Copy of the order App. A) A timely Petition for Leave to Appeal to the Illinois Supreme Court was denied October 5, 1982. (App. B)

On June 15, 1982 the Appellate Court of Illinois entered its order* affirming dismissal of Harvey's Complaint No. 80L 14172, *Harvey* v *Bard et al.,* (App. C). Petition for Leave to Appeal to the Illinois Supreme Court was denied on September 2, 1982. (App. D).

JURISDICTION OF THIS COURT

The judgments sought to be reviewed (the Illinois Supreme Court's denial of the Petitions for Leave to Appeal) were entered on September 2, 1982 and October 5, 1982. This Petition for Certiorari is filed within 90 days from said denials. Jurisdiction of this Court is invoked under title 28, U.S. Code Sec. 2106 and 28 U.S. Code Sec. 1257(3).

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* The Illinois Appellate Court disposed of each case by unpublished order per Ill. Sp. Ct. Rules, Rule 23.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the United States Constitution provides in entirety:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No state shall make or endorse a law which shall abridge the privileged or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction, the equal protection of the laws.

Ill. Rev. Stat. (*1980*) *Ch. 110, Sec. 48.3* In Motion to Dismiss . . .

> . . . If a material and genuine disputed question of fact is raised, the court . . . shall so deny such Motion, if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time.

Ill. Rev. Stat. (*1975*) *Ch. 146, Sec. 1, 3,* states as follows:

> Every application for change of venue by a party shall be by petition, setting forth the cause of the application and praying for a change of venue which petition shall be verified by the affidavit of the applicant. . . . A petition for change of venue shall not be granted unless it is presented before trial begins, and before the judge to whom it is presented has ruled on any substantial issue in the

case, provided that if any grounds for such change of venue occurs thereafter, a petition for change of venue may be presented based on such grounds.

RAISING THE FEDERAL QUESTIONS BELOW

In *Bard* v *Harvey*, 77 Ml 109422 Petitioner challenged the sufficiency and propriety of Bard's Motion for rehearing and Judgment NOV in the Trial Court as being contrary to USCA Amendment 7, setting forth question in her Answer and Objections to such Motion and in oral argument on said Motion, that the Court applied one standard of justice for Petitioner and a different one for Bard, contrary to USCA Amendment 14, and that there could be no determination of the questions Bard raised in Petition for Judgment NOV because such questions were for jury. The Trial Court made no ruling on the Federal questions (App. A.) The Trial Court's failure to protect and uphold Petitioner's Constitutional Rights was raised in Appellate Court in Petitioner's Brief p 3 and fully argued pp 85-91. The Appellate Court failed to address the Constitutional Rights Question. The Appellate Court's failure to protect Harvey's Constitutional Rights under USCA Amendments 7-14 was raised in Illinois Supreme Court Petition for Appeal p. 2,3 and fully argued pp. 9-28. The Supreme Court denied Petition without ruling on Constitutional issue.

In *Harvey* v *Bard*, 80 L 14172 Petitioner challenged the sufficiency of Defendants' defense of res judicata in the Trial Court, as being contrary to due process since no final judgment existed in the original case. The issue of a fair hearing before an impartial tribunal was raised by Petitioner's Motion for Change of venue, which the trial court denied (App. G.) The Trial court

made no ruling on the Constitutional Rights issue. The issue of the Trial Court's failure to protect Petitioner's Federal Constitutional Rights was raised in Appellate Court in Harvey's Brief pp. 6, 7, 8 and fully argued at pp. 35-50. Appellate Court failed to rule on such issues (App. C.) The issue of the Trial and Appellate Court's failure to protect Petitioner's Constitutional Rights was raised in Petition to Appeal to the Illinois Supreme Court pp. 2, 3 fully argued at pp. 15-43, as well as in her Motion for change of Venue, disqualification of the Justices of the Supreme Court and transfer of the case, which was denied by the Ill. Supreme Court (App. D.) without addressing the Federal Question.

STATEMENT OF THE CASES

This petition for Certiorari involves two separate but closely related lawsuits. In both instances petitioner acted pro se, not by choice, but necessity since she has been unable to locate a lawyer willing to prosecute another lawyer. In each instance she filed timely jury demands. In each case the court disposed of case by directed verdict, not in keeping with the United States Constitution or the law. In each case on Appeal, Petitioner raised the question of the breach of her rights under USCA Amendments 7, 14, and in each case the Appellate Court failed to rule on the Federal questions. And, the Illinois Supreme Court denied Petition for Leave to Appeal, in each.

In the first case, *Bard* v *Harvey,* 77 Ml 109422, Petitioner, Betty Sander Harvey was sued by attorney Bard, respondent, in a single page, non-specific Complaint, (C-3), alleging only that Bard was employed to perform unidentified legal services, that he performed same, that

Petitioner owed him $925. Petitioner's reply (C-7), filed with Jury demand, (C-6), set forth the specific services Bard agreed to perform and his failure to do so . . . raising disputed questions of fact. Further pleadings raised further disputed questions. Bard was awarded Summary Judgment (C-20).

On Appeal the Court reversed and remanded for reason that disputed questions of fact exist which are for jury (App. E). After trial, the jury decided such facts and entered verdict for Petitioner. Bard then moved for rehearing, and obtained judgment NOV (C-31) App. H, the Court not specifying wherein jury erred. Petitioner again appealed urging that the trial court's judgment NOV deprived her of her rights under USCA Amendments 7 and 14. The Appellate Court reversed the judgment NOV and remanded once more stating that disputed questions of fact exist which are for the Jury (App. F) that jury verdict will not be disturbed. Bard then filed for rehearing in Appellate Court and the same justices who twice, in written opinions, determined that disputed questions of fact exist in this case, which questions are for jury, reversed themselves and entered an order upholding judgment NOV. (App. A)

Meanwhile, Petitioner filed *Harvey* v *Bard* No. 80 L 14172 . . . the second suit herein, a 7 count legal malpractice complaint alleging two counts of wilfull and wanton misconduct as well as 5 for breach of specific covenants of Bard's contract, with jury demand (C2-C17).

Bard filed Motion to Dismiss (C135-C140) waiting to do so until judgment NOV was granted in the first case.

His defense was res judicata, collateral estoppel and merger by judgment. Petitioner's reply and subsequent pleadings, supported by Affidavit, raised disputed questions of fact. (C434, C437, C416, C419)

The matter was assigned to Judge Paul Elward before whom Petitioner had appeared in other closely related matters. Elward's prejudicial behavior against Petitioner in such cases, made her fear that she would not obtain a fair hearing before him.

Petitioner filed Motion for Change of Venue (App. 6) or Disqualification supported by Affidavit of prejudice, which was denied by Elward, instanter (App. G).

Despite fact that Harvey had an Appeal pending in the first case, (wherefore no final judgment existed) and fact that disputed questions of fact existed, Elward dismissed the 7 Count complaint with prejudice, the order stating no reason. On Appeal, Petitioner urged inter alia that the court's actions in denying her Motion for Change of Venue deprived her of her Constitutional Right to Due Process by requiring her to have her cause heard before a Prejudiced court, as well as denying her constitutional Right to Trial by Jury, USCA Amendments 7 and 14. Further, petitioner urged that all actions taken by the Court after denying petition for change were void, including dismissal.

On June 15, 1981 the Appellate court disregarded the Federal questions and upheld dismissal of Petitioner's Complaint as barred by res judicata of the first suit. (App. C)

Again, the court erred as no final judgment exists in such suit, the matter being herein on appeal.

The Court's have thereby denied Petitioner equal protection of the law.

Petitioner filed petition for Leave to Appeal to the Ill. Supreme Court.

Because she had filed three previous Petitions for Leave to Appeal to the Illinois Supreme Court, pleading for review based on breach of her Constitutional Rights, none of which was granted, Petitioner feared the Court's disdain for her Civil Rights would preclude a fair and impartial hearing if her case was heard before said Court, wherefore she filed a Motion for Change of Venue, Disqualification of the Justices of the Illinois Supreme Court and transfer of the case to Federal Court. Such Petition was denied (App. D) in the same order denying her Motion for Leave to Appeal Instanter.

REASONS FOR GRANTING THE WRIT

I.

THE DUTY OF THE STATE COURTS TO PROTECT PETITIONER'S RIGHT TO JURY TRIAL PROVIDED FOR UNDER USCA AMENDMENT 7, HAS BEEN SHIRKED AND IGNORED BY THE TRIAL COURT, THE APPELLATE COURT AND THE ILLINOIS SUPREME COURT. THE COURTS HAVE IN FACT THEMSELVES BREACHED AND DENIED PETITIONER SUCH CONSTITUTIONAL RIGHT, INSTEAD OF PROTECTING SAME.

A. This Court need not accept the Appellate Court's bizarre upholding of the Judgment NOV granted to Bard by the trial Court, nor the unfounded Dismissal of Petitioner's Complaint 80 L 14172 by res judicata based on the upholding of that judgment NOV, but can and should make its own judgment on such matters since said matters denied Petitioner her Constitutional Rights under USCA Amendment 7.

B. Since the United States Constitution USCA Amendment 7 states that in suits at common law where value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law, the Illinois courts cannot arbitrarily dispose of a Complaint filed for jury hearing when disputed questions of fact exist, nor can the Illinois Courts reexamine facts determined by the jury, and reverse the verdict of the jury particularly when no new evidence or facts are presented. Yet in the in-

stant case, the Illinois Courts did both, thus breaching Petitioner's Rights under USCA Amendment 7.

C. Illinois Revised Stat. (1980) Ch. 110 sec. 68.1 which provides for judgment non obstante veredicto is repugnant to United States Constitution USCA Amendment 7 without safeguards which prevent arbitrary application, as in Petitioner's case.

Certiorari should be allowed to bridge the gap between United States Citizen's theoretical paper Rights provided for under USCA Amendment 7 and the non-existence of such Rights in actuality due to lack of a designated final authority mandated to enforce such rights, or the failure of any authority to do so.

The seventh Amendment to the Constitution of the United States provides for Jury Trial in all cases where controversy is over $20.00. The controversy in suit 77M1 109422 involved $925.00. Petitioner filed a timely Jury Demand and paid for jury hearing.

It is well settled that questions of fact are for the jury to decide . . . and that Summary Judgment cannot be entered when disputed facts exist. In *Fellheimer* v *Weis* (1942), 316 Ill. App. 449:

> **Summary Judgment cannot be used to impair right to jury trial.**

Yet the trial Court did, despite the fact that *Ill. Sup. Ct. Rules, Rule* 61 b-3 states: It is the duty of all judges to support the Federal Constitution, which principle was upheld in *Gross* v *State of Illinois,* 312 F 2d 257, 259 (1963) the court stating:

> **State Judges as well as Federal have responsibility to protect persons from violation of their Federal Constitutional Rights.**

But the Illinois Courts are blind to the above and have failed to protect Petitioner's Federal Constitutional Rights. There is no question that Petitioner was entitled to Jury Trial. On Appeal the Appellate Court acknowledged this, ruling on July 10, 1979 in *Bard* v *Harvey* (1979), 74 Ill. App. 3d 16, as follows (App. E):

> Defendant states pleadings and affidavits in instant case presented factual question of whether all terms of agreement were contained in letter dated August 13, 1976. . . . Defendant stated during initial interview Plaintiff orally agreed to *perfect appeal, in estate of Sander case, to amend Harris Bank case* to prepare *a defense in Mackay case.* . . . Letter agreement refers only to "*estate of Sander*" and then to "immeditae problem of your pending lawsuits" and "urgent court dates to meet" . . . Language pending lawsuits is ambiguous* because at the time letter was written defendant had at least two pending lawsuits, the *Harris Bank* case and *Mackay* case in addition to the *estate.* Also plaintiff did in fact research and prepare a brief in Harris Bank case, thus plaintiff's own actions indicate an oral understanding and there is a genuine issue of fact as whether letter agreement contained parties complete agreement. In Mackay case plaintiff stated he told her he could not handle case; however defendant stated in affidavit plaintiff agreed to prepare a defense. Thus an issue of fact is raised.
>
> Pleadings, affidavits and exhibits also present genuine issue of fact as to whether plaintiff performed services outlined in letter. In letter plaintiff stated he would interview certain persons, study files and make recommendations week of August 16, 1976.

---

* *Dixie Square Thom McAn, Inc.* v *Dixie Square Mangmt. Co., Inc.,* (1977) 55 Ill. App. 3d 619, 624. Extrinsic evidence must be considered.

> Defendant in affidavit stated plaintiff did not interview persons and did not make recommendations until September 15, 1976 at which time he terminated services. It has been held that whether a contract has been performed according to its terms is question of fact.

The court cited *George F. Mueller & Sons, Inc.* v *Northern Ill. Gas Co.* (1977), 32 Ill. App. 3d 249, 253 in which the court held:

> Whether a contract has been fulfilled according to its terms is a question of fact to be determined by jury.

The court then stated:

> We conclude that genuine issues of material fact were raised by pleading and affidavit and that the court erred in granting Summary Judgment. . . . Based on the foregoing we reverse and remand.

It is abundantly clear that disputed questions of fact existed and that such facts were for the jury to decide.

After a lengthy trial in which the court exhibited outrageous prejudice against Petitioner, the Jury decided the questions of fact and entered verdict for Petitioner.

Bard then filed Motion for rehearing and Judgment NOV which the court, with renewed determination to prevent Petitioner from having her controversy decided by the Jury in keeping with Amendment 7, granted the judgment NOV. (App. H)

The Court circumvented the normal procedures in granting such judgment, by failing to state wherein the jury erred or what evidence was offered to verify that the jury erred.

Knowing she could not determine the issues, raised in Motion for Judgment NOV since the issues were for the jury, the court entered a nebulous order . . . as non-specific as Bard's Complaint . . . stating:

> This is a case where parties contracted for services. Plaintiff (Bard) is suing for fees. He did do the work. The work was well done.

What services??? What work???

The jury had determined otherwise. Can the 14th Amendment tolerate "it's anyone's guess" lawsuits and judgments:

The court's written order, prepared *before hearing* states:

> After reviewing the testimony, exhibits and evidence at the trial, (the Court) found plaintiff proved his case by the preponderance of evidence and that no evidence of any probative value was offered by defendant. . . . Jury verdict was against the manifest weight of evidence and against preponderance of evidence. . . .

Yet the law is clear, the court had no authority to weigh evidence or determine where the preponderance lies.

> Upon motion for judgment NOV neither trial court or Court of review should weigh evidence nor determine where preponderance lies. *Hadden* v *Fifer,* 339 Ill. App. 289, *Whalen* v *Sidney Wanzer & Sons,* 343 Ill. App. 486, *Koehler* v *Wolverine Ins. Co.,* 49 Ill. App. 1061

The trial court simply disregarded the law, and usurped the province of the jury.

Petitioner appealed again . . . and again the Appellate Court on December 29, 1981 entered opinion in Petitioner's favor reversing and remanding the Judgment NOV

(App. F) repeating the Court's earlier finding in *Bard* v *Harvey* (1979), 74 Ill. App. 3d 16, stating:

> We conclude that there was a genuine issue of material fact as to whether letter agreement contained parties' complete agreement . . . and that the determination of the understanding between parties was a material issue of fact for the jury.

The court further stated:

> The evidence was lengthy and involved and ultimately turned on the credibility of the parties. *It is the function of the Jury to weigh contradictory evidence, judge credibility of witnesses and draw ultimate conclusions as to the facts. The Jury's determination will not be disturbed merely because a jury could have found differently or judges might find other conclusions.*" . .. citing *Kupcikevicius* v *Fitzgibbons* (1976), 41 Ill. App. 3d 405, *Mizowek* v *DeFranco* (1976), 64 Ill. 2d 303, 310.

The court concluded:

> We find . . . evidence does not so overwhelmingly favor plaintiff that jury's verdict was against manifest weight of evidence . . . accordingly judgment NOV is reversed and cause remanded for new trial.

However, Bard, knowing that the jury had already rejected his theory of the non-specific suit, did not wish to risk facing another jury, nor could he under USCA Amendment 14, and instead filed petition for rehearing.

Unbelievably, in a totally irrational act, the same Appellate Court who had twice determined that disputed questions of material fact exist in this case which are for jury . . . decided such questions arbitrarily, and on April 20, 1982 entered an order (App. A) withdrawing their Dec. 29, 1981 opinion (App. F) and upholding Judgment NOV! ! !

The court's action was as unsubstantiated in law as were Bard's previously ill-gotten summary judgment and judgment NOV. A simple reading of the order will show the paradox

The opening paragraph states: "Upon further scrutiny of the record and consideration of the evidence. . ." Yet in their second opinion (App. M) the court stated: "It is the function of the jury to weigh contradictory evidence, judge credibility of witnesses and draw ultimate conclusions of fact. . ." *Kupcikevicius* v *Fitzgibbons*; *Mizowek* v *DeFranco.*

The court also stated in second opinion (App. F) on Dec. 29, 1982 that "the evidence was lengthy and ultimately turned on the credibility of the parties" . . . . "it is the function of the jury to judge the credibility of the parties and draw ultimate conclusions as to the facts. . ." How then on April 20, 1982 can the court which has had no contact with the parties or witnesses, judge their credibility . . . the axis on which these justices alleged this case turned?

The answer is they could not . . . by law . . . but they did . . . The court's order is cleverly conceived to make one believe Bard fulfilled his contract. In such order p. 2 the court summarized the letter agreement, making only one reference to Bard's agreement to interview persons. The letter (C-11) has four references to same as follows:

> Par. 2. "I will have to spend a great deal of time . . . interviewing persons from whom pertinent information may be elicited."
>
> Par. 7. "I will need to know names of lawyers and others you will authorize me to interview."

Par. 7. "Please attach to signed copy of this letter . . . a list of persons I may contact . .

Par. 9. "Return this letter with list of persons I may contact as noted above.

It clearly was provision of contract and fulfillment, a disputed fact as acknowledged in the Court's opinion (App. E).

During trial, petitioner offered in evidence her letter dated Aug. 13, 1976 directed to Bard (DEF. X10, PX-3) which stated: (Report of Proceedings C105, 106):

> Enclosed are the following. . . . List of Persons to call:
>
> a. Robert Sander Fo9-7466
> b. Marion and John Winkelmann Fo 9-7899
> c. John Bormann Fi 4-0714
> d. Ray Hupfauer Fl 3-5821.

Petitioner, examined Bard regarding this list as follows:

> Report of Proceedings (106-107):
> Harvey: Did you call Robert Sander?
> Bard: No.
> Harvey: Did you call Marion and John Winkelman?
> Bard: No.
> Harvey: Did you call John Bormann?
> Bard: No.
> Harvey: Did you call Ray Hupfauer?
> Bard: No.
>
> Report of Proceedings (103):
>
> Harvey: Would we have discussed that you wanted people to interview?
> Bard: Yes.

Under cross examination by his own attorney Minor Wilson, Bard also acknowledged his failure to fulfill his contract in this regard.

Report of Proceedings (327):

> Wilson: Mrs. Harvey gave you names of four people she thought you ought to interview. Did you interview those four people?
>
> Bard: No.

Petitioner had planned to call each of the surviving persons on list to testify to Bard's failure to interview them but the Court, in pre-trial proceedings, told Petitioner she could not since Bard had already acknowledged he had not interviewed them in his letter dated Oct. 18, 1976, directed to Harvey (PX 14.)

Bard's failure to do research is also fully set forth in Report of Proceedings pp. 100, 168, 190-193, 205-231, supported by P.X 1-A.

The Appellate court was fully aware of these terms of contract and Bard's failure to fulfill same as they were comprehensively addressed in Petitioner's Appellate Brief, pp. 28, 29, 57, 58.

Yet in its order of April 20, 1982 (App. A) the court disregards all of the above and states at p. 8:

> We conclude the evidence established plaintiff performed service he agreed to do, i.e. that he examined defendant's files, researched legal issues and took other steps [UNSPECIFIED] he deemed necessary to form an opinion . . . Judgment of Circuit Court (Judgment NOV) is affirmed.

The Appellate court not only reexamined the facts determined by the jury, and decided the disputed questions of material fact which they had twice determined

were for jury, but they disregarded and distorted the evidence which clearly shows Bard failed to fulfill his contract.

USCA Amendment 7 provides that no facts determined by a jury can be otherwise reexamined by any court in the land.

The Appellate court has done just that, making a mockery out of Amendment 7 and 14 and petitioner's Constitutional Rights.

There was no rehearing . . . no new evidence or witnesses . . . only one circumstance changed. Petitioner's suit 80L 14172 was on Appeal before these same justices.

Petitioner was also denied her Constitutional Right to Trial by Jury in suit No. 80L 14172, by the Circuit Court which wrongfully granted Bard's Motion to Dismiss when disputed questions of material fact exist, contrary to *Ill. Rev. Stat. Ch. 110 Sec 48(3)*, and by the Appellate Court which upheld dismissal. *In Wegener* v *Anna* (1973) 591 Ill. App. 3d 316, 319 the court held that Right to Trial by jury is a constitutional Right. Dismissal is not available by discretion. Certiorari must be granted to close the gap between our Constitutional Right to Trial by jury, and the lack of such right through the Court's failure to uphold it.

II.

THE DUTY OF THE STATE COURTS TO PROTECT PETITIONER'S RIGHT TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW PROVIDED FOR UNDER USCA AMENDMENT 14, HAS BEEN SHIRKED AND IGNORED BY THE CIRCUIT COURT, THE APPELLATE COURT AND THE ILLINOIS SUPREME COURT. SUCH COURTS HAVE IN FACT THEMSELVES BREACHED AND DENIED PETITIONER SUCH CONSTITUTIONAL RIGHTS INSTEAD OF PROTECTING SAME.

A. This court must not tolerate the Circuit Court's denial of Petitioner's Motion for Change of Venue, Disqualification of Judges or transfer, nor the Illinois Supreme Court's denial of such Motions when such Motions were supported by Affidavit alleging prejudice.

B. The judgments and orders entered against Petitioner were so lacking of rational substantiation in law as to render disposal of her causes of actions violative of due process where the trial court arbitrarily usurped the function of the jury and entered a non-specific judgment NOV in the first case, which judgment was upheld in the Appellate Court so that the same justices who upheld it, could then use such judgment to uphold Trial Court's wrongful dismissal of the second cause of action on the basis of res judicata of the first case . . . . when in fact no final judgment exists in such case to this very day.

USCA Amendment 14 provides that no state . . . shall deny to any person within its jurisdiction, the equal protection of the law, nor deprive any person of their property without due process of law. And it is well settled that hearing before a fair and impartial tribunal is essential for Due Process. *U.S.* v. *Scuito,* 531 F2d 842, 845.

In order to assure parties a fair trial, the law has provided for a change of Venue where any party fears that he will not obtain a fair and impartial hearing because of the prejudice of the court. Ill. Rev. Stat (1975) Ch. 146 §§1, 3.

However, the court denied Petitioner her Constitutional Right under Amendment 14.

After jury entered verdict in her favor in the matter of *Bard* v *Harvey*, Ml 109422, which we have hereinbefore addressed, Petitioner filed suit No. 80L 14172 *Harvey* v *Bard et al* (C2-C17) with Jury demand.

The case was assigned to Judge Paul Elward, before whom Petitioner had appeared in several previous actions. At such times Elward had repeatedly exhibited hostile, prejudicial behavior toward Petitioner.

Fearing she could not receive a fair hearing before said judge, petitioner filed Motion to transfer (C448) which the court denied (C451).

Petitioner then filed Motion for Change of Venue (C480) with supporting affidavit (C481, C482) and exhibits (C483-C503). Said Motion was denied instanter (App. G) despite the fact that it is well settled in Illinois law that: The right to one change of venue is absolute. *Rosewood* v *Transamerica Ins.* (1974) 57 Ill. 2d 247, 250, 251; *Ferde* v *McDaniels*, 37 Ill. App. 3d 1029, 1053.

The Circuit Court's denial of change not only was contrary to Illinois law, but it flew in the face of the 14th Amendment. In *Re Murchisen* 75 Sp. Ct. 623, 625 this court held:

> A fair trial in a fair tribunal is basic requirement of due process . . . it necessarily follows that Motions

> for change of venue to escape a biased tribunal raise Constitutional issues both relevant and essential.

(C.F. Irvin v Dowd 81 Sp Ct. 1639, 1642) And in *U.S.* v *Scuito,* 531 F 2d 842, 845 the court held:

> Right to tribunal free from bias and prejudice is not based on statute governing disqualification of judge for prejudice, but on Due Process of U.S. Constitution.

In *Stahl* v *Board of Supervisors,* 11 ALR 185 held:

> The Constitution guarantees recognize as a primal necessity that there be laws providing impartial tribunals for adjudication of rights.

(see 3 Willoughby, Constitution of the USA 2d E. Sec. 1124; 12 Am Jur Constitutional Law Sec. 635.)

After denying Petitioner's Motion for a change of Venue, the Court dismissed Petitioner's Complaint No. 80L 14172.

On Appeal Petitioner raised the issue that the court's failure to grant her Motion for Change of Venue breached her Constitutional Rights under Amendment 14 (and 7) and that it was the duty of the Appellate Court to set aside any order entered after denial of Motion for Change of Venue, since it is well settled:

> That where a Petition for Change of Venue is improperly denied, all proceedings including order of Dismissal entered by the Trial Court subsequent to denial of Petition for Change, were void.

Johnson v *United Motor Coach* (1966) 66 Ill. App. 2d 295-301; *Ferde* v *McDaniels* (1976) 37 Ill. App. 3d, 1053, 1055; *Palvis* v *Jewel Tea* (1977) 53 Ill. App. 3d 287,

288, 289; *Wheaton Nat. Bank* v *Aarvold* (1973) Ill. App. 3d 193, 195. *Little* v *Newell* (1973) 14 Ill. App. 3d 564, 568.

Judge Elward's disregard for the 14th Amendment is well known to the Appellate Court. Both *Palvis* v *Jewel Tea, and Ferde* v *McDaniels* were cases in which Elward refused to grant Motion for Change. In each instance, the Appellate court reversed and remanded.

Yet, in Petitioner's case, the Appellate Court not only condoned the Circuit Court's breach of Petitioner's Constitutional Rights but further breached such rights, failing to uphold the principle set forth in *Landa* v *Siegel*, 68 ALR 1172 that:

> The Courts may not through judicial decrees or judgment violate the due process and equal protection clause.

But who is going to stop them?

To understand the manner in which the courts deprived Petitioner of her due process and equal protection one must examine the manner in which the Circuit Court disposed of her Complaint.

Defendants' filed Motion to Dismiss alleging res judicata, collateral estoppel and merger by judgment based on the ill-gotten judgment NOV in *Bard* v *Harvey*. (C135-C140).

Petitioner filed objections (C434-C437) supported by Affidavit (C416-C419) and exhibits (C420-C432) stating inter alia: that the matter was on appeal wherefore no final order exists citing *23a ILP Sec. 299* which states that an appeal which has effect of setting aside judgment of lower court prevents judgment from operating

as res judicata; that the elements essential to res judicata, Collateral Estoppel and Merger by Judgment were not present in these cases; that Judgment NOV was not in keeping with the Appellate opinion and breached Petitioner's Constitutional Rights; that disputed questions of material fact exist therefore pursuant to *Ill. Rev. Stat. (1980) Ch. 110 Sec. 48 (3)* Dismissal was not available: Yet, the Circuit Court defied all legal precepts and entered an order dismissing with prejudice (C 515), Complaint No. 80L 14172.

The order of dismissal gave no reason. On appeal, Petitioner raised the issue that she had been denied her Constitutional Rights under USCA Amendments 14 (and 7) because the trial court refused to grant her Motion for Change of Venue, and she was obliged to have her cause heard before a prejudiced tribunal.

No unbiased court would dismiss a complaint as barred by another Complaint when:

A. No final judgment existed in the original action, since the matter was on Appeal and *50 CJS Judgments* states: "A final judgment operates as res judicata and bar to relitigation of controversy and the cause of action litigated merges in the judgment only where the time to appeal has expired without appeal being taken.

B. The judgment was a Judgment NOV arrived at in a most depraved manner.

C. The elements necessary for the defense of collateral estoppel, merger by judgment and res judicata were not present:

   1. The subject matter was not identical

      a. 77M1 109422: issue was whether Bard was hired to perform non-specified legal services, whether Harvey breached her contract and owed Bard $925.00.

b. 80L 14172: issue is whether Bard wilfully and wantonly failed to Amend suit 76L 1829, wilfully and wantonly failed to perfect Notice of Appeal on final account in estate; whether Bard breached his contract: by failing to prosecute suit 76LM 205, by failing to perfect Notice of Appeal, by failing to give Harvey honest legal advice and opinion.

2. The thing to be recovered is not identical
   a. 77M1 109422: Bard sought to recover $925.00 legal fees.
   b. 80L 14172: Harvey sought recovery for losses sustained in estate, in the sum of $1,330,000 for each of 6 Counts and $1,256.73 in the 7th.
3. The cause of actions aren't identical.
   a. 77M1 109422: is breach of contract against Harvey.
   b. 80L 14172: is legal Malpractice against Bard, et al.

D. When Disputed Questions of Material Fact exist and *Ill. Rev. Stat.* (1980) ch. 110 Sec. 48(3) prohibits dismissal by Motion.

E. When there is no specific finding on any specific matter in 77M1 109422, as required by Illinois Law, as set forth in *Hoffman* v *Hoffman,* 300 Ill. 413, 418 (1938) which stated:

> To operate as estoppel by verdict it is absolutely essential that there shall have been a finding on a specific fact in former adjudication on record that was material and controlling in that case or was necessarily involved in the verdict of judgment and also controlling in the pending case and where there is no such specific finding and more than one distinct issue of fact was involved

> in former case, so as its uncertain upon which issue decision rested the estoppel will not be applied.

The pleadings in 77L 109422, as well as the Appellate Opinions verify that numerous issues of fact were in dispute. And the Trial Court's Judgment NOV order (AAP-H) clearly shows that there was no specific finding in such case. The Appellate Order disposing of case under Rule 23, (APPC) verifies that the subjects and issues determined by the court are not material and controlling in the pending case. The truth is the Municipal Court would not have jurisdiction over the issues in suit 80L 14172 and could not decide same. The Appellate Court in Petitioner's case failed to consider and abide by well settled principles of law and distorted the facts defending its upholding of the Circuit Court's dismissal by stating: (App. C)

> Despite plaintiff's argument that no final judgment exists in original suit filed by Bard, we note that this court recently affirmed the trial court's decision granting defendant Bard's motion for judgment N.O.V. Thus plaintiff's argument is without merit.

But it is the Court's argument which is without merit. Legal decisions cannot be predicated on what may happen in the future . . . not without breaching the 14th Amendment.

No final judgment existed in case no. 77M1 109422 when the Trial court entered its order dismissing suit No. 80L 14172, as the matter was on appeal. And no final judgment existed in 77M1 109422 when the Appellate Court entered its order affirming dismissal because the time for taking appeal had not expired with no appeal being taken. ***50 CJS Judgments. Sec. 620.*** And no final judgment will

exist until this court rules on this Petition. In *Thompson* v *Louisville,* 362 U.S. 199 (1960) the Court ruled that a conviction wholly devoid of evidentiary support violates due process.* Shouldn't this principle also equally apply to Civil judgments, particularly Judgment NOV? This is not the first instance wherein the Appellate Court of Illinois distorted the record and disregarded the facts. In the original cause of action from which both these cases arose, *Harvey* v *Harris,* 73 Ill. App. 3d, 280, the Appellate Court set forth more than 25 falsifications of facts in their opinions, to dispose of Harvey's case. The courts must not be allowed to enter orders predicated on falsification of facts and speculation on what may happen in the future.

Instead of basing its opinions on altered facts and crystal ball predictions which they transformed into self-fulfilling prophecy in this case by upholding the trial Court's wrongful entry of Judgment NOV in suit 77ML 109422, thus establishing a reason for the same justices upholding the trial court's wrongful dismissal of petitioner's Complaint No. 80L 14172 . . . the Appellate Court should have set aside such dismissal for reason that the Trial Court's failure to grant Petitioner's Motion for Change of Venue, denied Petitioner's Constitutional Rights provided for under USCA Amendment 14.

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* Both Judgment NOV (App. H) and the order upholding same (App. A) are wholly devoid of evidentiary support as is the order Dismissing Complaint 80L14172 and the order upholding same (App. C).

III.

THE ILLINOIS COURTS CANNOT BE ALLOWED TO EVADE AND PASS THE QUESTION OF THE COURT'S BREACH OF PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS UNDER AMENDMENTS 7, 14, FROM THE CIRCUIT COURT TO THE APPELLATE COURT, FROM THE APPELLATE COURT TO THE ILLINOIS SUPREME COURT, FROM THE ILLINOIS SUPREME COURT TO THE UNITED STATES SUPREME COURT . . . WITH NO ONE RULING ON THE FEDERAL QUESTION, AND IF THIS COURT REFUSES TO ADDRESS THE MATTER IN CERTIORARI, WHERE CAN PETITIONER FIND PROTECTION OF HER CONSTITUTIONAL RIGHTS?

This Petition is a plea for the United States Supreme Court to grant Certiorari and designate a final tribunal which must, by law, enforce Petitioner's Constitutional Rights. The Supreme Court Rules of the State of Illinois, and case law all establish that the Courts must not deprive citizens of their Constitutional Rights, and that it is the duty of all judges to support the Federal Constitution. *Ill. Sup. Court Rules, rule 6 1b(3) Gross* v *State of Ill. 312 Fd 2d 257, Landa* v *Siegel 68 ALR 1172.* But wherein does the recourse lie for Petitioner who has had her Rights stripped away by the Circuit and Appellate Courts? The judicial Review Board has no authority over improper rulings and official misconduct of judges. And the Illinois Supreme Court has chosen to wink at their brothers' unethical conduct. The Illinois courts have not only failed to uphold and protect Petitioner's Constitutional Rights, they have breached such Rights, failing to address the question of the Breach, passing the question from the Circuit Court to the Appellate Court, from there to the Illinois Supreme Court in an endless "Evers to Tinker to Chance" but with far less desirable results.

The Illinois Courts by their judicial judgments violate the due process and equal protection clause of USCA Amendment 14 with impunity . . . knowing that when they do so, the State Appellate Court will passively condone such violations, and the State Supreme Court in their posture of hear no evil, see no evil when done by the judicial system, will refuse to review cases alleging breach of Civil Rights. They feel secure in the knowledge that the Supreme Court of the United States cannot review all such cases. Petitioner, too, is well aware of the heavy burden this Court bears, but she earnestly believes the questions herein set forth are of such magnitude and so crucial to the well being and protection of each citizen of the United States that they must be determined by this Court which has been empowered with authority over all other Courts in the United States.

Certiorari should be allowed so that this Court may set forth explicitly which Court not only has the duty, but is required by law, to review all cases wherein Breach of Constitutional Rights is alleged.

CONCLUSION

For all of the reasons set forth, certiorari should be allowed: and, upon consideration of the substance of Petitioner's arguments, the judgment NOV in suit 77ML 109422 and the order Dismissing Complaint 80L 14172 by reason of res judicata of such judgment should be reversed as repugnant to the Fourteenth and Seventh Amendments of the United States Constitution.

Respectfully submitted,

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